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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

WILLIAM D. BUNCH, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the trial court denies a pre-trial motion by petitioner for production of the Internal Revenue Service Special Agents' Report, which the petitioner contends is open to discovery under Federal Rule of Criminal Procedure 16(a)(2), does that refusal violate petitioner's constitutional due process right to a fair trial under the Fifth Amendment to the Constitution of the United States, and his statutory right under Rule 16?

2. When the trial court is not subject to a definitive procedure, requiring it before trial to review in camera a pertinent document at issue, which petitioner maintains is discoverable, is the latter's constitutional rights under Brady v. Maryland and his statutory right under Rule 16 violated after petitioner has shown both a pre-trial

need and materiality for the document in question?

3. Is the doctrine of "work-product" relating to criminal discovery enunciated in Hickman v. Taylor as applied to Rule 16(a)(2), which exempts the mental impressions, conclusions, opinions, and legal theories of the attorney for the government, being too broadly construed when the trial court refuses to order disclosure of a Special Agent Report, stating said report is an internal government document and thereby not subject to disclosure?

4. Under the doctrine enunciated by this Court in United States v. Holland, 348 U.S. 121 (1954), is petitioner denied due process when the government fails to establish "with reasonable certainty" an opening net worth in a tax evasion case, as it is required to do under the dictates of Holland?

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OPINIONS BELOW

The Opinion of the Court of Appeals is as of this date unreported. In the Federal District Court, two opinions were written and unreported regarding (1) the production of a special agents report before trial, and (2) the court's ruling on a Motion for Judgment of Acquittal. All opinions appear in the Appendix hereto.

JURISDICTION

The Order of the Court of Appeals was entered on December 2, 1982. No re-hearing was sought. This Peition for Certiorari is filed within sixty days of that December 2nd date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V, Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Federal Rule of Criminal Procedure 16:

"(a) Disclosure of Evidence by the Government.
(1) Information Subject to Disclosure.
(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant to a government agent; and recorded testimony

of a defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery or relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant, the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the prepara-

tion of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examination and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Expect as provided in paragraphs (A),(B) and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents of the case, or of statements made by government witnesses except as provided in 18 U.S.C. § 3500."

* * *

STATEMENT OF THE CASE

On October 2, 1980, petitioner was indicted by the Federal Grand Jury of

the United States District Court, Southern District of Ohio, Eastern Division, on three counts of tax evasion in violation of Title 26 United States Code, Section 7201. The counts dealt with the tax years of 1973, 1974 and 1975.

On January 19, 1981, petitioner filed a motion to dismiss the indictment on the grounds the government did not establish a firm opening net worth. On May 12, 1981, the trial court denied said motion subsequent to an oral hearing held on April 3, 1981.

Further basis for federal jurisdiction at the trial level occurred when the pre-trial motion for production of an I.R.S. Special Agent Report under Criminal Rule 16 was denied.

Jury trial commenced on August 10, 1981. The government presented their theory of opening net worth through

testimony of a supervisory revenue agent for the Internal Revenue Service as an expert in income taxes. He calculated petitioner's net worth as of the end of 1972, the base year. Using a starting net worth base figure of $64,681.18, he calculated the amount of taxes the government claimed was due in the years at issue.

Petitioner called a certified public accountant as a tax expert, whose testimony contravened the government's expert as to taxes due, noting that petitioner did not owe but instead overpaid in two of the three years at issue.

On September 18, 1981, the jury found petitioner guilty on the three counts in the indictment. A motion for acquittal pursuant to Criminal Rule 29 was denied on January 25, 1982.

Petitioner filed an appeal with the Court of Appeals for the Sixth Circuit

on December 2, 1982, that Court's opinion affirmed the judgment of the trial court, one judge dissenting in part and concurring in part.

REASONS FOR GRANTING THE WRIT

FEDERAL TRIAL COURTS ARE UNCLEAR AND INCONSISTENT AS TO WHAT DOCUMENTS CONSTITUTE "WORK PRODUCT" MATERIALS EXEMPT FROM DISCLOSURE. THE LEGISLATIVE HISTORY BEHIND RULE 16, FOLLOWING HICKMAN v. TAYLOR, SHOWS AN INTENT TO EXEMPT ONLY THE MENTAL IMPRESSIONS, THOUGHTS, AND LEGAL STRATEGY OF OPPOSING COUNSEL. WHAT IS NEEDED IS A RULING BY THIS COURT DEFINING THE LIMITS OF "WORK PRODUCT".

DIRECTLY INVOLVED IS THE MANDATE OF BRADY v. MARYLAND, AND PETITIONER'S DUE PROCESS RIGHTS, WHICH WOULD BE SAFEGUARDED AND ENSURED IF A PROPER CONCEPT OF "WORK PRODUCT" IS ENUNCIATED BY THIS COURT.

The "work product" doctrine was announced in Hickman v. Taylor, 329 U.S. 495 (1947), and recognized as applicable to criminal discovery in United States v. Nobles, 422 U.S. 225 (1978). Rule 16 (a)(2), a partial codification of this "work product" doctrine, exempts from

discovery, reports, memoranda, or other internal government documents made by the prosecutor or his agents in connection with the investigation or prosecution of a case; the rule does nothing further to adequately detail or define, nor does the rule state what procedure is required by the trial court when a determination is needed on whether the material at issue is indeed discoverable.

A definitive ruling from this Court on "work product", one of the most important areas of criminal discovery, could be rendered because of the particular facts in this case:

At a pre-trial oral hearing in this case, the trial court denied the defense access to an I.R.S. Special Agent Report (SAR) which is a compilation of memoranda, tax schedules, reports and other documents prepared by a Special Agent of

the Internal Revenue Service in the course of an investigation of a taxpayer. It is both the denial of access to this particular report plus the procedure the trial court used in determining its discoverable content that has resulted in petitioner's writ before this Court.

Considering the procedural question first--in a federal criminal case, when the defense wishes to compel production of what is considered a discoverable item, and a hearing is held pursuant to that motion, there is no requirement for an in camera inspection of the material by the court to determine its discoverability.

In the case at bar, the trial court denied defense the Special Agent Report noting Rule 16(a)(2), the "work product" exemption; it came to its decision with no perusal of the document because under

the appropriate rule and current case law, it is not required to do so. There is thus the distinct possibility (under the present pre-trial process) that the report contained material discoverable under the statute.

What is clearly needed in cases such as these is an oral hearing where the trial court is required to review the document at issue--after the defense shows its materiality. This procedure, namely review by the trial court, would ensure and safeguard the due process trial rights under which the accused is entitled by judicially certifying all discoverable material has been presented to the accused.

The significance of this procedural-in-camera review is evident when one considers that pre-trial discovery is statutorily a part of the vast majority of federal criminal cases:

For example, under Criminal Rule 16(1)(a), the prosecution is required to deliver to the defense all statements of the defendant upon the latter's demand. When a document like the Special Agent Report is compiled by the government, in pursuance of their investigation, there is a good chance that defendant's statements are an integral part of that report. Yet there is no assurance that all those statements have been delivered, whether inadvertant or not, when a trial court is not required to review the document in question.

Closely allied with the above, is this Court's holdings in Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Augurs, 427 U.S. 97 (1976). Since Brady grants the accused a due process right to the disclosure of favorable evidence in the government's possession, a review of the document by the

Court would ensure that all Brady material was delivered. As noted earlier, this procedure would only occur when the defense first shows materiality and a specific need in pursuit of its case.

The most important reason for granting this writ, however, is the immediate need for a ruling on what constitutes "work product". Petitioner respectfully contends that the concept of "work product' is not being properly construed by the trial courts. The underlying reasoning in Hickman is "work product" centers on the ideas, strategy, and mental thoughts of opposing counsel. Petitioner has no argument that these "internal documents" are the private papers of the opposition and should remain such. To permit disclosure would only disrupt the orderly administration of criminal justice.

The Special Agents Report is not entirely an "internal document". It is a composite of diverse facts of the I.R.S. agents compiled during the course of the investigation; and as such, it is difficult to perceive how the entire contents of the report constitute nothing but the "mental" notes of the government.

The legislative history amendments to Criminal Rule 16 supports this contention. Before the Criminal Procedure Act (P.L. 94-64) was passed, a House Conference Report No. 94-414 noted the following:

> "Rules 16(a)(2) and (b)(2).--Rules 16(a)(2) and (b)(2) define certain types of materials (work product) not to be discoverable. The House version defines work product to be 'the mental impressions, conclusions, opinions, or legal theories of the attorney for the government or other government agents.' This is parallel to the definition in the Federal Rules of Civil Procedure. The Senate version returns to the Supreme Court's language and defines work product to be 'reports, memoranda, or other

internal government documents'. This is the language of the present rule.

The Conference adopts the Senate provision.

The Conferees note that a party may not avoid a legitimate discovery request merely because something is labeled 'report', 'memorandum', or 'internal document'. For example, if a document qualifies as a statement of the defendant within the meaning of Rule 16(a)(1)(A), then the labelling of that document as 'report', 'memorandum', or 'internal government document' will not shield that statement from discovery. Likewise, if the results of an experiment qualify as the results of a scientific test within the meaning of Rule 16(b)(1)(B), then the results of that experiment are not shielded from discovery even if they are labelled 'report', 'memorandum', or 'internal defense document'."
2 U.S. Code Congressional and Administrative News 716-17.

The import of this statement shows that the true intent of "work product" centers on its substance not its label. Congress may have reverted back to the original language of the rule but the intent remains the same--the mental impressions of the opposing counsel are exempt--not investigatory reports. The

labelling of a document an "internal" one should not shield it from disclosure; and the proper way of ensuring full disclosure is through a hearing and an in camera review.

The refusal of the trial court to disclose the special agent's report additionally adversely affected petitioner's due process rights to a fair trial because the government misconstrued the opening net worth.

In United States v. Holland, 348 U.S. 121, at 132. This Court held:

> "[A]n essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets. The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset." (Emphasis added)

The government did not establish an accurate net worth at the outset. As the

Court of Appeals' Opinion notes, it neglected to list $15,000.00 worth of home and office furnishings. The Opinion found difficulty "with the manner in which the government treated" this issue.

The Court in further explanation notes:

> "It is for the government, if it proceeds on a net worth theory, to negate the validity of any 'relevant leads...reasonably susceptible of being checked'. Until and unless it does so, the burden of proof does not shift to the taxpayer. The government witness' statement implies a misunderstanding of this fact. In this case, the November 3, 1971 financial report was indisputably a relevant lead to an asset which was, we think, reasonably susceptible of being checked. It is unclear from the record whether it was checked."

Petitioner maintains that one of the surest ways in guaranteeing that a proper base net worth is established is making certain all "discoverable" material, such as the Special Agent Report, is released to defense before trial so that any sub-

stantial conflicts like the $15,000.00 error are rectified.

As it stands today, petitioner has no viable way of ascertaining whether a proper net worth was calculated since he never gained access to the report.

CONCLUSION

Petitioner respectfully contends that the holding in Hickman and Rule 16 are being misconstrued; that material exempt from discovery was legislatively and judicially meant to include only the "internal mental" impressions of counsel; and that because of misapplication, a writ of certiorari whould arise to review the order and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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